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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1988

EARTH SATELLITE CORPORATION

AND

CONTINENTAL CASUALTY COMPANY,

Petitioners

v.

ROBERT HASTINGS

AND

DIRECTOR, OFFICE OF WORKERS'

COMPENSATION PROGRAMS

UNITED STATES DEPARTMENT OF LABOR,

Respondents

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Robert Hastings, the Respondent, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 53 of this Court and to file herein his response to the Petition for Writ of Certiorari to this Court filed by Petitioner in single counterpart, without printing the same. The typed brief of the Respondent in opposition is presented herewith.

The affidavit of Robert Hastings in support of this motion is filed herewith.

Dated July, 17, 1980

Respectfully Submitted,

(TERSH) BOASBERG
JONATHAN L. FARMER
2101 L Street, N.W.
Suite 906
Washington, D.C. 20037
(202) 466-8960
Counsel for Respondent
Robert Hastings

IN THE

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AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

Robert Hastings, being duly sworn, on oath disposes and says:

1. He is the Respondent in the above-entitled action and makes this Affidavit in support of his motion for leave to proceed in forma pauperis herein.

2. He is 57 years old and is retired because of medical disability from his job as a corporate comptroller-treasurer.

3. The disability payments made by the Petitioners pursuant to the Order of Administrative Law Judge, U.S. Department of Labor, Case No. 76-DCWL-176, provides almost all of his income.

4. I has had a stroke, pulmonary embolisms, phlebitis, and is totally disabled.

5. Because of his poverty, Petitioner is unable to pay fees and to pay or give security for costs of this appeal and still be able to provide himself and spouse with the necessities of life.

6. This is a brief in opposition to a petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The petition does not raise substantial questions of public importance or constitutional law as alleged by the Petitioners. Affiant believes he is entitled to the redress sought in this Court.

ROBERT HASTINGS

Subscribed and sworn to before me this 15th day of July, 1980.

NOTARY PUBLIC

My Commission Expires: 9/14/84

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondents Motion for Leave to Proceed in Forma Pauperis and Affidavit were mailed, postage prepaid, this 17th day of July, 1980 to the following parties:

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1215 19th Street, N.W.
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TERSH BOASBERG

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COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR,

Respondents

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

Opinions Below.....1

Jurisdiction.....2

Questions Presented.....2

Statutes Involved.....2

Statement of the Case.....2

Reasons for Denying Writ.....6

I. UNITED STATES SUPREME COURT PRECEDENT FULLY SUPPORTS THE COURT OF APPEALS JUDGEMENT BELOW ON RETROACTIVITY.....6

II. SUPREME COURT PRECEDENT FULLY SUPPORTS THE COURT OF APPEAL'S JUDGEMENT BELOW ON FINDING REVERSIBLE ERROR.....7

Conclusion.....8

CITATIONS

Cases:

Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974).....6,7

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).....8

Hutto v. Finly, 437 U.S. 678 (1979).....6

NLRB v. Mosey Mfg. Co., 595 F. 2d 375 (7th Cir. 1979).....6

United States v. Fresno Unified School District, 592 F. 2d 1088 (9th Cir. 1979).....6

Statutes:

33 U.S.C. § 901 et. seq.....6,8

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UNITED STATES DEPARTMENT OF LABOR,

Respondents

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMIBA CIRCUIT

Respondent, Robert Hastings, prays that this Court deny Petitioners', Earth Satellite Corporation and Continental Casualty Company, Petition for Writ of Certiorari to Review (hereinafter cited as Petition) the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 19, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals entered March 19, 1980, not yet reported, appears in the Appendix to the Petition for Writ of Certiorari in the above-entitled matter (hereinafter

cited as App.) (App. 1-27a), as do the opinion and decision of the Benefits Review Board dated June 30, 1978 (App. 28a-37a), and the decision and order of Administrative Law Judge Robert S. Amery dated August 12, 1977 (App. 38a-61a).

JURISDICTION

Respondent is satisfied with the statement of jurisdiction presented by Petitioners.

QUESTIONS PRESENTED

1. Does Supreme Court precedent support the judgement of the Court of Appeals below on the issue of the retroactivity of §14(m)?

2. Is the Court of Appeals' finding of reversible error supported by Supreme Court precedent?

STATUTES INVOLVED

Respondent is satisfied with Petitioners' presentation of the relevant statutes.

STATEMENT OF THE CASE

Respondent Robert Hastings, now 57 years old, suffered a work-related, compensable stroke on April 1, 1971, while employed as a high-level executive by Earth Satellite Corporation, the insured of the Carrier/Petitioner herein.

At the time of his stroke, Respondent was earning $30,000 per year.

During his recovery at home from the stroke--from April, 1971 until he returned to work for Earth Satellite on a part-time basis in February, 1972--Respondent was entitled to (and was awarded by the authorities below) compensation for temporary, total disability. (This award is undisputed here.)

Respondent never fully recovered 100% from his 1971 stroke which left him permanently, partially disabled with some indeterminate percentage of impairment.

Respondent, however, was able to return to work on a part-time basis at Earth Satellite while further recovering from his stroke. He worked there from February, 1972 until he suffered a second, work-related disabling injury--phlebitis and pulmonary emboli (hereafter emboli)--in March, 1974. Thereafter, Respondent was permanently and totally disabled.

During this two-year period of part-time work, Respondent was paid at the hourly rate of his former $30,000 annual salary. However, because he worked less than 40 hours per week, he earned only $9,228 during the twelve months just immediately preceeding his disabling attack of emboli in March, 1974. A review of Respondent's undisputed earnings record during this two-year period shows him gradually working more hours each month and, consequently, steadily increasing his wages until the March, 1974 emboli attack.

During this two-year period of part-time employment, Respondent also was entitled to (and was awarded) compensation for the residual permanent, partial disability caused by his 1971 stroke. Under §8(c)(21) of the Act, 33 U.S.C. §908(c)(21), Respondent was entitled to compensation equal to 2/3 of the difference between his "average weekly wages" ($177/wk., based on his part-time earnings of $9,228) and his "wage-earning capacity" ($577/wk., based on his $30,000 pre-stroke injury), i.e., 2/3 of $400 or $266. But instead of receiving $266 per week as permanent, partial disability, Respondent was awarded only $70 per week because that was the Act's statutory weekly maximum compensation in force at the time of his 1971 stroke.

Still, as noted above, the percentage of Respondent's permanent, partial disability resulting from the 1971 stroke was

never determined--presumably because with the $70 weekly maximum then in force, the amount due Respondent (2/3 of the difference between current wages--$9,000 and earning capacity--$30,000) under any rational percentage of disability which could be found, nevertheless, would exceed $70/wk. Thus, the authorities below never decided the question of percentage of partial disability, awarding Respondent the then maximum of $70/wk. This failure has important ramifications as will be seen later.

The BRB decision provides that Respondent's award of $70/wk. for permanent, partial disability resulting from the 1971 stroke should be paid only until a total of $24,000 is reached, despite the fact that in 1972 the Act was amended to remove the $24,000 ceiling. At the time this amendment went into effect, on November 26, 1972, Respondent had not yet received $24,000 nor had this claim even been filed.

As noted above, in March, 1974, Respondent suffered a second, work-related compensable disabling injury (emboli). The authorities below found that the combination of both the 1971 stroke and the 1974 emboli--in some indeterminate percentage--left Respondent permanently and totally disabled and, consequently, entitled to permanent, total disability payments under the Act.

The ALJ held that Respondent's award of permanent, partial disability payments of $70/wk. (for the 1971 stroke) merged into Respondent's permanent, total disability at the time of the 1974 emboli. In other words, Respondent's award of permanent, partial disability stopped when he became permanently, totally disabled in 1974. However, the ALJ then went on and inexplicably computed Respondent's entire compensation for permanent, total disability based only on 2/3 of Respondent's then

admittedly part-time wages ($177/wk.) instead of on Respondent's total wage earning capacity ($577/wk.) before both the 1971 stroke and the 1974 emboli reduced him to permanent, total disability. Thus, a $30,000 per year executive ended up with only $118 a week compensation for permanent, total disability resulting from two fully compensable injuries.

The BRB's decision did not disturb the method of the ALJ's computation of $118/wk. for Respondent's permanent, total disability. However, the BRB modified the ALJ's decision by holding that, in addition to the $118/wk. award, Hastings also should receive, at the same time, the $70/wk., previously awarded for permanent, partial disability until a maximum of $24,000 had been received. Thus, Respondent now was to receive two separate but concurrent awards: one for $70/wk. (up to $24,000) for his permanent, partial disability resulting from the 1971 stroke; and a second for $118/wk. for permanent, total disability stemming from the 1974 emboli, the latter compensation award based only on Respondent's then actual part-time salary.

Respondent filed a petition for review of the BRB decision with the United States Court of Appeals for the District of Columbia Circuit challenging the BRB's application of the $24,000 limitation of unamended §14(m) to his benefits for his permanent partial disability related to the first injury and the calculation of benefits owed for the second injury. On March 19, 1980, the Court of Appeals issued its decision and held that the BRB erred in applying the $24,000 benefit ceiling to the award for Respondent's first injury since amended §14(m) was to be applied retroactively to those cases when the ceiling had not been reached prior to the amendment date. The Court also held that the BRB

erred in calculating the award for the second injury since the Act required consideration of a claimant's potential earnings as well as his actual earnings.

REASONS FOR DENYING WRIT

I

UNITED STATES SUPREME COURT PRECEDENT FULLY SUPPORTS THE COURT OF APPEALS JUDGEMENT BELOW ON RETROACTIVITY

Petitioners endeavor to circumvent the detailed decision of the Court of Appeals for the District of Columbia Circuit on the basis of inapposite case law and tortured constitutional reasoning. All of their arguments were fully briefed below, duly considered by the Court of Appeals and flatly rejected.

The nub of Petitioners' claim, whether cloaked in the guise of prior Supreme Court decisions on retroactivity (Petitioners' Argument IA) or on the sanctity of contracts (Petitioners' Argument IB), is that the Appeals Court misinterpreted this Court's leading decision on retroactive statutory construction, namely, Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974). Petitioners' argument is badly off the mark.

Not only is Bradley still the leading case on the subject,[1] but the Court of Appeals 27-page opinion below exhaustively considered each of Bradley's aspects and applied them to the question before us: whether the 1972 Amendments to the District of Columbia Workmen's Compensation Act,[2] repealing the

[1] The reasoning of the Bradley case has been followed in subsequent cases; See Hutto v. Finly, 437 U.S. 678 (1979); NLRB v. Mosey Mfg. Co., 595 F. 2d 375 (7th Cir., 1979); U.S. v. Fresno Unified School District, 592 F. 2d 1088 (9th Cir. 1979).

[2] 33 U.S.C. §901 et. seq., hereafter cited as the "Act."

$24,000 compensation limit imposed by former §14(m) of the Act, should be applied "retroactively" to a worker injured prior to the Amendments' passage but whose compensation had not yet reached $24,000. In reaching its unanimous decision, the Court of Appeals considered in impressive detail:

1. The pertinent statutory language of the Act and its 1972 Amendments (App. 16a-17a).

2. The full legislative history of the Act and its 1972 Amendments (App. 17a).

3. All pertinent aspects of the 1972 Amendments in toto and individually (App. 17a-18a).

4. The important rights vs. remedies distinction enunciated in the case law (App. 18a-20a).

5. The remedial nature of the Workmen's Compensation Act (App. 19a, note 22 and App. 20a, note 24).

6. The prior decisions of the Benefits Review Board on this precise issue (App. 20a).

7. And flatly rejected Petitioner's due process claims (App. 20a, note 25).

Supreme Court precedent in Bradley, supra, was rigorously followed in all respects.

II

SUPREME COURT PRECEDENT FULLY SUPPORTS THE COURT OF APPEALS' JUDGEMENT BELOW ON FINDING REVERSABLE ERROR

Almost as an aside to their misdirected attack on retroactivity, Petitioners also contend that the Court of Appeals "...substituted its judgement for that of the ALJ...in total derogation of..." Supreme Court precedent when the Court of Appeals reversed the authorities below on the issue of how to

compute a previously injured workman's benefits.[3] This is nonsense.

The Supreme Court clearly has held that the scope of judicial review embraces the power to correct an abuse of administrative discretion below. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). The Court of Appeals thoroughly discussed the pertinent statute involved (Section 10(c) of the Act, 33 U.S.C. §910(c) (1976), the apposite case law and the deference owed to the administrative agency's application of these.[4] However, the Court of Appeals rightly concluded that the agency's procrustean refusal to use the flexibility provided by the above section (fully supported by applicable case law) was "...an abuse of discretion that requires remand."[5]

There is no departure from Supreme Court precedent here. Petitioners' argument on this point totally lacks intrinsic merit and pales before the Supreme Court's requirements of substantiality and impact for granting a petition for certiorari.

CONCLUSION

For all of the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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[3] Petition, at 39.

[4] App. 22a-25a.

[5] App. 25a.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondents Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit were mailed, postage prepaid, this 17 day of July, 1980 to the following parties:

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